92-979

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No. ____

IN THE UNITED STATES SUPREME COURT OCTOBER TERM 1992

BARRY NAKELL, LEWIS PITTS, and WILLIAM A. KUNSTLER, *Petitioners*,

v.

JOE FREEMAN BRITT, et al., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Rule 11 sanction of "reasonable expenses incurred because of the filing" include hypothetical attorneys' fees a party might have incurred had he actually retained counsel?

2. May a district court impose a monetary sanction jointly and severally on attorneys without consideration of any of their individual conduct, individual need for deterrence, or individual ability to pay?

3. Do Rule 11 and the First Amendment permit well-grounded causes of action in a complaint to be sanctioned solely on the ground that they were filed for an improper purpose?

4. May evidence that attorneys voluntarily dismissed an action be used as the primary basis for

concluding that the action was sanctionable, when the Advisory Committee has determined that such remedial conduct establishes a "safe harbor" protecting against the imposition of sanctions?

PARTIES

The Plaintiffs in the district court included the Robeson Defense Committee, Carnell Locklear, Mary Sanderson, Thelma Clark, Eleanor Jacobs, Betty McKellar, Eddie Hatcher, and Timothy Jacobs. The Defendants included North Carolina Governor James G. Martin, Attorney General Lacy H. Thornburg, State Bureau of Investigation Director Robert Morgan, S.B.I. Agent James Bowman, Robeson County District Attorney Joe Freeman Britt, District Attorney Richard Townsend, Witness Coordinator Lee Edward Sampson, and Sheriff Hubert Stone. The Appellants in the Fourth Circuit, who are the Petitioners in this proceeding, were Plaintiffs'

counsel in the district court: Barry Nakell, a professor at the University of North Carolina School of Law; Lewis Pitts, an employee of the Southern Justice Institute; and William Kunstler, a nationally renowned civil rights lawyer.

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on July 2, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit has not been reported. It is reprinted in the appendix hereto, p. A-17, infra.

The memorandum decision of the United States District Court for the Eastern District of North Carolina (Howard, D.J.) has not been reported. It is reprinted in the appendix hereto, p. A-1, infra.

JURISDICTION

On July 2, 1992, the Court of Appeals for the Fourth Circuit modified and affirmed a decision of the United States District Court for the Eastern District of North Carolina in this matter. Petitioners filed a timely

petition for rehearing and suggestion of rehearing en banc, which the Fourth Circuit denied on August 20, 1992.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 11. Signing of Pleadings, Motions, and Other Papers. Sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the

extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioners are three civil rights lawyers who brought this § 1983 action on behalf of Native Americans living in Robeson County, North Carolina. Their complaint alleged that state and local officials were violating Plaintiffs' First and Sixth Amendment rights. In addition to demanding vindication of the civil rights of all Plaintiffs, the action sought an injunction of a state

criminal prosecution of Timothy Jacobs and Eddie Hatcher, two Native Americans who had just been acquitted of federal charges.

Shortly after the lawsuit's filing on January 31, 1989, the North Carolina Attorney General's Office entered an appearance on Defendants' behalf. As is customary in such cases, that Office did not charge Defendants, including the Governor, the Attorney General, and the Director of the State Bureau of Investigation, a legal fee for the representation.

Within three months of its filing, the action was mooted by Jacobs' guilty plea and Defendants' cessation of the activities alleged in the complaint. Petitioner Barry Nakell therefore telephoned defense counsel Joan H. Byers to request that Defendants stipulate to dismissal of the case pursuant to Rule 41 of the Federal Rules of Civil Procedure.

Ms. Byers, a Special Deputy Attorney General, advised Mr. Nakell that obtaining authorization to enter into a stipulation would be "inconvenient." She suggested in a return call that Petitioners instead file a unilateral motion for dismissal stating that Defendants had no objection. Ms. Byers surreptitiously taped both telephone conversations with Mr. Nakell, a law professor at the University of North Carolina. She did not mention Rule 11.

Honoring the Attorney General's express request for such a courtesy, Petitioners unilaterally moved to dismiss their action. On May 2, 1989, the district court dismissed the case. The lawsuit had lasted but three months. No answer was filed; no substantive motions were resolved. No discovery took place, and there was not a single hearing or conference.

On June 13, 1989, six weeks after the lawsuit's dismissal with prejudice, Defendants filed a Rule 11 motion -- thereby resurrecting a long-closed case. Had Defendants in fact signed the professed unobjectionable but "inconvenient" stipulation of dismissal, their motion would have been barred.

After oral argument of their motion, defense counsel submitted affidavits to the district court on September 27, 1989 purporting to specify their fees and expenses. Without affording Petitioners an opportunity to respond, the district court issued its Rule 11 decision on September 28, 1989, ordering Petitioners to pay Defendants the amount requested by defense counsel the day before -- to the last penny. Robeson Defense Committee v. Britt, 132 F.R.D. 650 (E.D.N.C. 1989).

For this three-month lawsuit, the court imposed "attorneys' fee sanctions" of $92,834.28. Yet, because the

action had been defended primarily by the Attorney General's Office, these "attorneys' fee" charges were never intended to be expenses actually borne by Defendants. No payment was contemplated; the Attorney General's Office did not submit the Governor a bill.

On September 18, 1990, the Fourth Circuit vacated the sanctions. In re Kunstler, 914 F.2d 505 (4th Cir. 1990). Specifically, the court emphasized that the "primary, or 'first' purpose of Rule 11 is to deter future litigation abuse" and that "[i]n establishing the amount of the sanction, the district court improperly focused on providing 'compensatory sanctions.'" Id. at 522.

The Fourth Circuit held that a district court must, in imposing a Rule 11 sanction, address four factors: (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum sanction necessary to deter; (3) the ability to pay; and (4) various factors relating to the individual

attorney. Id. at 523. With respect to the third factor, the court held flatly: "a monetary sanction imposed without any consideration of ability to pay would constitute an abuse of discretion." Id. at 524. The court further noted that the sanction must not bankrupt the parties or force them from the practice of law.

On remand, the district court again found that the entire requested $92,834.28 of hypothetical attorneys' fees was "reasonable and justified." (A-7) The district court recognized however, that it was barred by Fourth Circuit precedent from awarding more than $59,000, since time Defendants spent in prosecuting the Rule 11 motion was not compensable. (A-9-10) Without explaining its calculations, the court rounded off the $59,000 to an "attorneys' fee sanction" of $50,000. (A-15)

In disregard of the Fourth Circuit's instructions regarding each individual's culpability and ability to pay,

the district court held: "[B]ecause this court intends to impose joint and several liability, Mr. Kunstler, Mr. Nakell, and Mr. Pitts may either contribute equally to the sanction, or devise their own contribution scheme." (A-12) In a revealing afterthought, the court remarked: "They obviously coordinated in filing the lawsuit which resulted in this sanction, and this court will leave them to do the same in paying this sanction." (A-12)

In an unpublished, per curiam opinion, a panel of the Fourth Circuit modified and affirmed. (A-17) After striking $6,675 of the sanctions for lack of documentation, the panel simply dismissed without discussion or analysis all of Petitioners' other arguments. (A-22-23)

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW HAVE AUTHORIZED "TEAM" SANCTIONING CONTRARY TO THIS COURT'S DECISION REQUIRING A FOCUS ON "PERSONAL, NON-DELEGABLE RESPONSIBILITY."

This Court has unambiguously declared that the purpose of Rule 11 is not to reimburse parties for their attorneys' fees, but to impress upon an attorney, through sanctions, his personal responsibility for his actions:

> The purpose of the provision in question, however, is not reimbursement but "sanction"; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, non-delegable responsibility.

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 127 (1989).

The circuits have amplified on this principle, holding that "because deterrence, not compensation, is the principal goal of Rule 11, courts should impose the least severe sanction that is likely to deter." Jackson v. Law

Firm, 875 F.2d 1224, 1229 (6th Cir. 1989). See also Doehring v. Union County Board, 857 F.2d 191, 194 (3rd Cir. 1988); Stewart v. American International Oil & Gas Co., 845 F.2d 196, 202 (9th Cir. 1988); Thomas v. Capital Security Services, Inc., 836 F.2d 866, 881 (5th Cir. 1988) (en banc); Brown v. Federation of State Medical Boards, 830 F.2d 1429, 1437 (7th Cir. 1987).

As this Court emphasized in Pavelic, this approach to Rule 11 mandates a focus on the individual: "The message thereby conveyed to the attorney, that this is not a 'team effort' but in the last analysis yours alone, is precisely the point of Rule 11." 493 U.S. at 127 (emphasis original). The only way that a court can effectively communicate this "message" of personal responsibility is by pinpointing the wrongful actions -- or omissions -- of the individual attorney and tailoring the sanction to fit the individual crime.

Likewise, the mandate to impose the least severe sanction necessary to deter requires an examination of the specific attorney. One attorney may be adequately deterred by a lesser sanction than another. And enhancing the punishment of one attorney because of the misconduct of a second attorney hardly serves the purposes of deterrence. See Orlett v. Cincinnati Microwave, Inc., 954 F.2d 414, 420 (6th Cir. 1992) (quoting American Judicature Society, Studies of the Justice System, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 at 40) ("In determining an appropriate sanction under amended Rule 11, the court should consider . . . the circumstances (including the financial state) of the individual to be sanctioned and those sanctioning measures that would suffice to deter that individual from similar violations in the future."); CTC Imports & Exports v. Nigerian

Petroleum, 951 F.2d 573, 578 (3rd Cir. 1991), cert. denied, Aham-Neze v. Sohio Supply Co., ___ U.S. ___, 112 S. Ct. 1950 (1992) ("Where, however, the court sanctions more than one party, it must make particularized findings and conclusions as to each party's liability considering his or her unique circumstances.").

The district court and the Fourth Circuit in this action wholly ignored the individual. They considered the action to be a "team effort" and, contrary to Pavelic, imposed on the three attorneys a "team" sanction:

> [B]ecause this court intends to impose joint and several liability, Mr. Kunstler, Mr. Nakell, and Mr. Pitts may either contribute equally to the sanction, or devise their own contribution scheme. They obviously coordinated in filing the lawsuit which resulted in this sanction, and this court will leave them to do the same in paying this sanction.

(A-12) Despite the voluminous evidence offered by each Petitioner, the district court flatly refused to consider them

as individuals: "Because their violations are the same, this court makes no distinction among them but treats them equally." (A-14)[1]

Thus, for example, although Petitioner Professor Nakell offered overwhelming evidence of his previously unblemished record and the profound effect that the Rule 11 decision has had upon him, the court offered no explanation for why it believed a $50,000 sanction was necessary to deter Professor Nakell in light of that evidence. It did not suggest that the evidence lacked

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[1]In fact, the courts below did not even assess "improper purpose" on an individual basis. Yet, Rule 11 focuses on the "improper purpose" of the signer. Although each attorney signed the complaint and could be held responsible jointly for frivolous factual or legal claims, "improper purpose" of an attorney can only be determined by looking at the objective evidence of the motive of that attorney. Under the district court's and the Fourth Circuit's approach, conduct of one attorney could be used to attribute an improper purpose to another - - an anomalous result. Significantly, the district court's determination of the attorneys' motives was reached without benefit of an evidentiary hearing.

credibility; because of the sources (leading members of the bar and an esteemed rabbi), it could not have. Instead, the court declined even to acknowledge the existence of such evidence.[2]

Similarly, in the case of Petitioner Lewis Pitts, the $50,000 sanction imposed "jointly and severally" is 45% more than Mr. Pitts and his wife earned together in 1990 and 82% more than he earned individually in 1990. Since "joint and several liability" allows Defendants to choose to collect the entire award from any one of the Petitioners, Mr. Pitts is liable for the entire sum. Should Defendants choose to exercise this right, Mr. Pitts will be rendered bankrupt.

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[2]The district court did consider collective aggravating factors. There was, however, no discussion or mention of any potential individual mitigating factors. See Doehring v. Union County Board, 857 F.2d 191, 195-96 (3rd Cir. 1988) (reversing a $25,000 sanction when a district court had similarly refused to review potential "mitigating" circumstances such as the attorney's past record and adverse press scrutiny already resulting from the sanction).

The goal of deterrence cannot be met by assessing a sanction beyond the ability of the sanctioned party to pay. Rule 11 sanctions are designed to make an individual sit up and take notice; they are not intended to force an attorney out of business. The courts below refused, however, to consider the monetary circumstances of the attorneys.

Of course, whenever the sanctioned conduct is solely the filing of a complaint, the violations of the attorneys who signed the complaint will be, as the district court opined, "the same" -- the violation of Rule 11 by filing a frivolous complaint. Under the district court's view, as endorsed by the Fourth Circuit, attorneys jointly filing a complaint should always receive a joint sanction -- regardless of their personal circumstances, their ability to pay any sanction, and the individual need for deterrence. Such an approach will rarely serve the purposes underscored in Pavelic.

The fundamental question before the district court and the Fourth Circuit was: What is the least severe sanction necessary to ensure that any Petitioner will not in the future violate Rule 11? It was never answered.

II. THE DECISIONS BELOW CONFLICT WITH THE DECISION OF THE SECOND CIRCUIT, WHICH REFUSED TO AWARD PRIVATE MARKET RATE ATTORNEYS' FEES TO AN ATTORNEY GENERAL'S OFFICE.

During the three months of this case's existence, Defendants' three attorneys claim they spent a total of 468.4 hours, for which they demanded payment, including expenses, of $59,000.[3] The district court awarded them $50,000.

[3]Defendants actually demanded a total of $93,000 -- including costs of pursuing sanctions over an additional five months -- in direct violation of Blue v. Department of the Army, 914 F.2d 525, 549 (4th Cir. 1990), cert. denied, 111 S. Ct. 1580 (1991). The district court, applying Blue, properly trimmed this amount to $59,000. See Brubaker v. City of Richmond, 943 F.2d 1363, 1387 (4th Cir. 1991).

The court thus approved a compensatory attorneys' fee award as if Defendants had retained counsel and paid attorneys' fees at a market rate of $107.50 per hour. In fact, Defendants did neither.

Defense counsel, who are employees of the Attorney General's Office, have not submitted any bill for legal services to the Governor, the Attorney General, the S.B.I. Director, or any State-employed Defendant. These Defendants have suffered no attorneys' fee expenses; their

lawyers' time did not cost them anything.[4] The awarded "fees" therefore constitute a windfall.

The Second Circuit so held in affirming Burgos v. Murphy, 123 F.R.D. 440, 442 (S.D.N.Y. 1988). Burgos v. Murphy, 876 F.2d 890 (2d Cir. 1989). In Burgos, just as in the decision below, the circuit court upheld without comment a Rule 11 sanction in favor of a State Attorney General's Office. However, the United States District

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[4] Even if Defendants may recover for costs not incurred by them but by the taxpayers, such costs will scarcely amount to one-third of the requested rate. According to state records, from January through June 1989, Ms. Byers was paid by the State $4,547.00 per month, while Mr. Blackwell was paid $4,045.00 per month. Based on Defendants' representation that Mr. Blackwell was working full time on this matter, his reported hours would suggest an average of 125 hours per month. His actual hourly cost to state taxpayers was, therefore, $32.36; Ms. Byers' was $36.38. Even if 100% overhead is added to the salaries of the Deputy Attorneys' General who worked on this case, their hourly rate could not exceed $75.00. Assuming incorrectly that the purpose of Rule 11 is to grant full compensation, it still should not provide the Attorney General's Office with a 50% profit margin.

Court in New York, unlike the one in North Carolina, refused to award market rate attorney' fees. Indeed, the court held that such an award to an Attorney General's Office would result in a "significant windfall." 123 F.R.D. at 442.

The Southern District of New York therefore refused to award an attorneys' fee sanction at "the prevailing rate for private lawyers." Id. By contrast, the Eastern District of North Carolina did precisely that. (A-7-8)[5]

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[5] The two cases also remarkably differ regarding the degree of documentation required of an Attorney General's Office. The court in Burgos placed great emphasis on the fact that "the Assistant Attorney General apparently did not maintain complete time records and has not disclosed to what extent her calculation is based on actual records rather than after-the-fact reconstruction." Id. The district court in this case held that every last minute of the Attorney General's Office's claimed 468.4 hours was "reasonable and justified." (A-7) The court ignored the uncontradicted evidence that the Office did not maintain contemporaneous time records and that the reconstructed records of one Special Deputy Attorney General revealed precisely "5.0 hours" for 57 of the 93 days he worked on

A recent decision of the Third Circuit also allows government attorneys to be compensated at the prevailing market rate for private attorneys:

> We have no doubt that the government may recover under Rule 11 when confronted with a frivolous action. . . The difficult question is that of the reasonable hourly rate for government attorneys. At first blush, it seems inappropriate for the services of an Assistant United States Attorney to be valued at some kind of market rate. However, upon reflection, we can perceive no difference between the situation of an Assistant U.S. Attorney and that of a public interest lawyer. . . .

Napier v. Thirty or More Unidentified Fed. Agents, Employees or Officers, 855 F.2d 1080, 1092 (3rd Cir. 1988).

The Second Circuit appears to have the more reasoned position. Rule 11 permits as a compensatory sanction only "the reasonable expenses incurred because of the filing . . : including a reasonable attorney's fee." Rule

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this case.

11, Fed.R.Civ.P. Accordingly, the circuit courts have recognized that a party's actual attorneys' fees constitute a cap limiting the "reasonable attorney's fee" which may be awarded:

> What constitutes 'reasonable expenses' and a 'reasonable attorney's fee' within the context of Rule 11 must be considered in tandem with the rule's goals of deterrence, punishment, and compensation. In this respect, we note 'reasonable' does not necessarily mean actual expenses.

Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 879 (5th Cir. 1988); White v. General Motors Corp., Inc., 908 F.2d 675, 683-84 (10th Cir. 1990)(quoting Thomas); Fahrenz v. Meadow Farm Partnership, 850 F.2d 207, 211 (4th Cir. 1988)("'reasonable' does not necessarily mean actual expenses and attorney's fees"); INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 404 (6th Cir. 1987)(same), cert. denied, 484 U.S. 927 (1987). If

actual attorneys' fees are zero, how can an award of $50,000 be reasonable?

This is a significant issue. As both courts and commentators have recognized, Rule 11 sanctions are primarily imposed against civil rights lawyers. American Judicature Society, Studies of the Justice System, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11; Tobias, Reassessing Rule 11 and Civil Rights Cases, 33 Howard L.J. 161 (1990); Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189 (1988). Conversely, Attorney Generals' Offices and other government attorneys will frequently be the victims of such transgressions. This Court should grant certiorari to resolve the conflict among the circuits regarding the appropriate attorneys' fee to be awarded to government attorneys.

III. THE CIRCUITS DISAGREE AS TO WHETHER WELL-GROUNDED CLAIMS IN A COMPLAINT ARE SANCTIONABLE BASED SOLELY ON IMPROPER PURPOSE.

The district court concluded in its first opinion that the primary claims of the complaint -- based on the First and Sixth Amendments -- were viable. In fact, the district court considered the voluntary dismissal of such viable claims to be "the most damning evidence of all" of Petitioners' improper purpose. Robeson Defense Committee v. Britt, 132 F.R.D. 650, 655 (E.D.N.C. 1989). In this same decision, the district court also expressly concluded that such an improper purpose standing alone could support sanctions.

On the first appeal, the Fourth Circuit refused to address the question whether viable claims could be sanctioned merely for an improper purpose: "We need not decide whether a complaint which is well grounded in law and in fact can be sanctioned solely on the basis that it was

filed for an improper purpose." 914 F.2d at 518. But, the court nevertheless gave the precise direction that, in calculating monetary sanctions, "claims within a pleading which do not merit sanctions, should be excluded from consideration." 914 F.2d at 523.

On remand, the district court awarded as sanctions attorney's fees for all of defense counsel's time regardless whether it was attributable to frivolous claims.[6] By awarding $50,000 of the $59,000 in requested sanctions, the district court necessarily imposed sanctions on causes of action -- the First and Sixth Amendment claims -- not found to be frivolous. The Fourth Circuit affirmed without comment, thereby endorsing the award of

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[6]Mr. Blackwell and Ms. Byers had "divided the perceived legal issues between the two of [them] . . . ." Mr. Blackwell took charge of "standing, conspiracy, the § 1983 claims, the First Amendment claims, and the issue of the Plaintiffs' absence from the jurisdiction." Ms. Byers assumed responsibility for "double jeopardy, abstention, 6th Amendment claim, 5th Amendment claim, Prosecutorial immunity, misconduct."

sanctions for well-founded causes of actions solely based on improper purpose.

There is a split among the Courts of Appeal regarding whether this approach is a proper construction of Rule 11. The Fifth, Ninth, and Tenth Circuits have all held that sanctions cannot be imposed solely based on improper purpose if the complaint is well-grounded in fact and law.

The approach of the Fifth, Ninth, and Tenth Circuits is consistent with the language and intent of Rule 11, as revised in 1983. In National Association of Government Employees v. National Federation of Federal Employees, 844 F.2d 216 (5th Cir. 1988), the district court imposed sanctions because it found that the suit had been brought to harass the defendant and to gain a political advantage in a union campaign. The Fifth Circuit reversed on the ground that Congress had eliminated "subjective

intent" as an element of Rule 11. Now, the inquiry is solely whether "objectively ascertainable circumstances" give rise to an inference of "improper purpose." Id. at 224. Absent an inquiry into actual motive, the only circumstances that may be objectively ascertained at the time of the filing of a complaint are whether it is "well grounded in fact and warranted by existing law." If so, then the filing was proper regardless of counsel's subjective intent":

> "If a reasonably clear legal justification can be shown for the filing of the paper in question, no improper purpose can be found and sanctions are inappropriate." Amended Rule 11 mandates the court to focus on objective circumstances in determining whether an attorney has conducted "reasonable inquiry" and a paper is "well grounded" in fact and law, and purely subjective elements should not be reintroduced into the determination concerning "improper purpose."

Id. at 224 (quoting Schwarzer, Sanctions Under the New Federal Rule 11, 104 F.R.D. 181, 195 (1985)). See also

Burkhart v. Kinsley Bank, 852 F.2d 512, 515 (10th Cir. 1988) (if a complaint was warranted by law "then any suggestion of harassment would necessarily fail"); Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986) ("We hold that a defendant cannot be harassed under Rule 11 [by a complaint] which complies with the 'well grounded in fact and warranted by existing law' clause of the Rule.").

The Seventh Circuit has reached a contrary conclusion, holding that sanctions can still be imposed even when claims are well-founded in law and fact. Brown v. Federation of State Medical Boards, 830 F.2d 1429 (7th Cir. 1987). In doing so, the Seventh Circuit looks to the parties' subjective intent in evaluating "improper purpose", despite the revision of Rule 11:

> Much of [plaintiff's] brief in this court is devoted to a demonstration that it had an objectively sufficient basis for its claim of racial discrimination. Perhaps it can

> persuade the district court that it did, but this is not enough. Because Rule 11 has a subjective component as well, the district court must find out why [plaintiff] pursued this litigation.

Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1083 (7th Cir. 1987), cert. dismissed, 484 U.S. 901 (1988).

The approach condoned by the Fourth Circuit and the Seventh Circuit -- allowing sanctions for well-founded causes of action -- cannot be squared with Rule 11, as revised. Further, it overrules this Court's decisions in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), Flight Attendants v. Zipes, 491 U.S. 754 (1989), and Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam). In each of these cases, this Court held that fees could be awarded to defendants in § 1983 and Title VII cases, only if the plaintiff's claim was frivolous, unreasonable, or without foundation. Christiansburg Garment Co., 4343

U.S. at 422; Flight Attendants, 109 S.Ct. at 2739; Hughes, 449 U.S. at 14. Under the guise of applying Rule 11 in this § 1983 action, the district court and Fourth Circuit have nullified that principle: They have held that attorney's fees may be awarded to defendants even if the complaint is not frivolous, unreasonable, or without foundation.

Underlying both the Rule 11 decisions and this Court's fee petition decisions is an acknowledgement of the First Amendment right "to petition the Government for a redress of grievance." In order to protect this right, this Court has repeatedly held that an individual cannot be punished for filing a valid lawsuit for an improper purpose or motive. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972), this Court ruled that the "right to petition" protected otherwise valid lawsuits allegedly filed for an improper anticompetitive

purpose. Similarly, in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983), the NLRB sought to enjoin a state court proceeding brought by an employer for the improper purpose of retaliating against employees. Relying on the First Amendment right to petition and its decision in California Motor Transport, the Court held that a cease-and-desist order could not be issued on the ground of motive without the additional finding that the suit lacked a reasonable basis in fact or law:

> The filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.

Id. at 743.

It is thus well established under the First Amendment that an individual may not be punished for his motivation in exercising his right to petition. That is,

however, precisely the effect of the district court's ruling and the Fourth Circuit's affirmance.

This Court should grant certiorari in order the resolve the conflict among the Circuits and to resolve the conflict between the decision in this case and this Court's decisions in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989); Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

IV. THE DECISIONS BELOW PRIMARILY PUNISH PETITIONERS FOR TAKING REMEDIAL ACTION THAT, UNDER PROPOSED AMENDMENTS TO RULE 11, WOULD EXONERATE PETITIONERS.

The decisions below directly conflict with the Advisory Committee's recent changes to Rule 11. Under

those amendments, Petitioners could not be sanctioned at all.

Petitioners dismissed the complaint prior to receiving any notice of their adversaries' intention to seek Rule 11 sanctions. Under such circumstances, the Advisory Committee's Notes to the Amended Rule 11 explain that the Rule will provide for a "safe harbor":

> Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

137 F.R.D. at 81.

Petitioners voluntarily withdrew this action -- the proper procedure -- and yet the district court deemed this dismissal to be "the most damning evidence of all" of a Rule 11 violation. 132 F.R.D. at 655. It is anomalous that Petitioners should be assessed especially severe

sanctions precisely because they followed the procedure that will shortly become the law of the land.

This Court should grant certiorari to resolve the issue whether Rule 11 sanctions may be imposed for taking the same curative actions expressly encouraged and protected by the new amendments to Rule 11.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

November, 1992.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION
No. 89-06-CIV-3-H

In Re: WILLIAM KUNSTLER; In Re: BARRY NAKELL; In Re: LEWIS PITTS.

ROBESON DEFENSE COMMITTEE; CARNELL LOCKLEAR; MARY SANDERSON; THELMA CLARK, ELEANOR JACOBS, BETTY MCKELLAR, EDDIE HATCHER, and TIMOTHY BRYAN JACOBS,

Plaintiffs,

v.

JOE FREEMAN BRITT, RICHARD TOWNSEND, LEE EDWARD SAMPSON, HUBERT STONE, LACY H. THORNBURG, ROBERT MORGAN, JAMES BOWMAN, JAMES G. MARTIN, SBI DOE I, SBI DOE II, SBI DOE III, DEPUTY SHERIFF DOE I, DEPUTY SHERIFF DOE II, DEPUTY SHERIFF DOE III, DEPUTY SHERIFF DOE IV, DEPUTY SHERIFF DOE V, DA DOE I, DA DOE II, DA DOE III, ROBESON COUNTY, et al.,

Defendants.

INTRODUCTION

This matter is before the court on remand from the United States Court of Appeals for the Fourth Circuit following its decision in In re Kunstler, No. 89-2815, published at 914 F.2d 505 (4th Cir. 1990). The Supreme Court denied the plaintiff-appellants' petition for writ of certiorari on April 15, 1991. Kunstler v. Britt, Pitts v. Britt, and Nakell v. Britt, 111 S. Ct. 1607 (1991).

The present controversy involves the imposition of sanctions under Federal Rule of Civil Procedure 11 against plaintiffs' counsel, Mr. William M. Kunstler, Mr. Barry Nakell, and Mr. Lewis Pitts. This court imposed Rule 11 sanctions upon defendants' motion following a voluntary dismissal of the underlying civil action. A statement of the case is set out in this court's initial order, Robeson Defense Committee et al. v. Britt, 132 F.R.D. 650 (E.D.N.C. 1989), and the decision of the court of appeals,

In re Kunstler, 914 F.2d 505 (4th Cir. 1990), and will not be restated.

The Court of appeals affirmed the imposition of Rule 11 sanctions against plaintiffs' counsel in this case, but vacated the actual sanction imposed. It remanded with instructions for determining an appropriate sanction and to allow sanctioned counsel to respond. The parties have fully briefed and argued the issue of an appropriate sanction and a hearing was held on August 15, 1991, in New Bern, North Carolina. Accordingly, the matter is ripe for decision.

DISCUSSION

In remanding this case, the Fourth Circuit instructed the court to consider the purpose of Rule 11 in determining the type of sanction and enumerated four factors for consideration in selecting a monetary sanction.

"[T]he primary . . . purpose of Rule 11 is to deter future litigation abuse." In re Kunstler, 914 F.2d at 522. However, other purposes of the rule, such as compensating the victims of the violation, controlling court dockets, and punishing the present violation, should be considered by the district court in determining an appropriate sanction. Id. In selecting a sanction, the court must impose the least severe sanction adequate to serve the various purposes of Rule 11. Id. (citing Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987)).

When a monetary sanction is imposed, the amount of the award "should always reflect the primary purpose of deterrence." In re Kunstler, 914 F.2d at 523. The Fourth Circuit adopted the approach taken by the Tenth Circuit in White v. General Motors Corp., 908 F.2d 675 (10th Cir. 1990), cert. denied, 111 S. Ct.788 (1991), which requires the district court to expressly consider four factors when

choosing a monetary award. In re Kunstler, 914 F.2d at 523. The factors enumerated are: (1) the reasonableness of the opposing party's attorney's fees; (2) the minimum amount necessary to deter; (3) the ability to pay; and (4) the severity of the Rule 11 violation. A monetary sanction under Rule 11 should not be based solely upon the amount of the attorney's fees, but rather upon all of the enumerated factors. Therefore, in calculating a Rule 11 award, the district court may look beyond actual fee statements or records of billable hours: "a monetary sanction should never be based solely on the amount of attorney's fees claimed by the injured party." Id.

I. A Monetary Sanction is Appropriate

The array of possible sanctions a court may impose is broad: a reprimand; mandatory continuing legal education; a fine; mandatory pro bono services; reasonable expenses and attorney's fees resulting from the violation;

and perhaps most severe, disbarment from practicing before the court. Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure, 121 F.R.D. 101,124 (1988). This court must select the least oppressive sanction capable of achieving Rule 11's primary purpose of deterrence.

The sanctioned counsel in this matter are experienced trial attorneys who are well versed in the Federal Rules of Civil Procedure and Rule 11. Furthermore, sanctioned counsel perform legal services for public interest clients. Because of the nature of the violation and counsel's continued insistence that no violation occurred, more than a mere reprimand is necessary to deter future violations. Thus, this court finds that a monetary sanction is appropriate in this case as the minimum sanction adequate to deter future Rule 11 violations.

II. Determining the Amount of a Monetary Sanction

Having concluded a monetary sanction is necessary, this court must consider the four factors enumerated by the Fourth Circuit in its remand.

A. Reasonableness of the Attorneys' Fees

Attorneys for the State defendants submitted affidavits of legal fees and expenses incurred in this matter in the amount of eighty-three thousand six hundred thirteen dollars and fifty-eight cents ($83,613.58). Attorney Steven Lawrence for the Robeson County defendants submitted an affidavit of fees and expenses in the amount of nine thousand two hundred twenty dollars and seventy cents ($9,220.70).

This court has carefully reviewed the attorneys' time sheets and finds that the hours expended by counsel were reasonable and justified. The State attorneys have requested compensation at a rate of $107.00 per hour,

which this court finds reasonable. The court further finds that the hourly rate of $80.00 charged by Steven Lawrence is exceedingly fair and probably low for an attorney of his experience and competence.

Included in the State's request for fees was a sum totalling approximately ten thousand dollars ($10,000.00) for paralegals, investigators, and other costs. This court finds this sum to be fair, accurate, and justified.

The fee statements submitted by counsel are only one factor to be considered by the court in determining an appropriate sanction under Rule 11. The Fourth Circuit held that "whether the large amount of time devoted to the pursuit of sanctions was warranted, and whether the injured parties failed to mitigate their costs by delaying their pursuit of sanctions until after the dismissal" were to be evaluated by this court. In re Kunstler, 914 F.2d at

523. Accordingly, the fees set out above must be viewed in light of these factors.

Furthermore, this court recognizes that "[l]itigants should be able to defend themselves from sanctions without incurring additional sanctions." Blue v. United States Dep't of Army, 914 F.2d 525, 549 (4th cir. 1990), cert. denied, Chambers v. United States Dep't of Army, 111 S. Ct. 1580 (1991). Having concluded that the fee requests are accurate and justified as submitted, but that the fee requests include the fees and expenses incurred in pursuing Rule 11 sanctions, this court deems it necessary to subtract from the requested fee totals the amounts expended in this lengthy pursuit of sanctions.

Accordingly, of the 680 hours expended by attorneys for the State of North Carolina, the court finds that approximately 280 hours (approximately 40%) were used in pursuing their motion for Rule 11 sanctions after

the plaintiffs' motion to dismiss on April 24, 1989. The court further finds that roughly one-third of the fees and expenses submitted by Mr. Lawrence relates to the County defendants' motion for sanctions under Rule 11.

Applying the aforestated principles and deducting from the total fee request the fees directly related to the pursuit of sanctions, this court finds that the maximum amount it can justifiable award the State defendants is fifty-three thousand dollars ($53,000.00). The court further finds that, in consideration of the foregoing, the maximum amount it can award the Robeson County defendants is six thousand dollars ($6,000.00). Thus, the maximum amount this court finds it can properly consider reasonable as a monetary sanction is fifty-nine thousand dollars ($59,000.00).

B. Minimum to Deter

In determining the minimum amount adequate to deter, this court recognizes that the primary purpose of Rule 11 sanctions is to prevent the filing of baseless lawsuits. The court chooses its sanction carefully so as not to chill either the bringing of facially valid lawsuits, or a lawyer's creativity in pursuing novel theories of recovery. See In re Kunstler, 914 F.2d at 524. This court finds that more than a nominal amount or "token" award is necessary to insure that sanctioned counsel will not repeat their actions in filing baseless claims.

In both their briefs and oral arguments, sanctioned counsel repeatedly asserted that reputational damage and public embarrassment was an adequate sanction. Even after direct questioning by this court, sanctioned counsel failed to assist this court in assessing an appropriate dollar amount consistent with the purpose of deterrence. This

court therefore bases its finding that a substantial monetary sanction is necessary on its own evaluation of counsel's conduct and their reactions to the Rule 11 claim.

C. Ability to Pay

Any monetary award imposed by this court must not be so great as to bankrupt sanctioned counsel. The burden of proving ability to pay is on the sanctioned counsel. Both Mr. Nakell and Mr. Pitts have presented evidence of their financial condition. The size of the sanction imposed is not of such magnitude that it would drive any of the sanctioned counsel into bankruptcy or from the practice of law. Furthermore, because this court intends to impose joint and several liability, Mr. Kunstler, Mr. Nakell, and Mr. Pitts may either contribute equally to the sanction, or devise their own contribution scheme. The obviously coordinated in filing the lawsuit which

resulted in this sanction, and this court will leave them to do the same in paying this sanction.

D. Other Considerations

This amount of the sanction imposed by this court is also deemed appropriate in light of two additional considerations. First, the sanctioned counsel are all experienced trial lawyers who are familiar with Rule 11 and the attributes of a well-pleaded complaint. That the plaintiffs' complaint both lacked a legal basis and contained numerous factual errors indicates that the sanctioned counsel made no attempt to comply with Rule 11 despite their knowledge and experience as attorneys. The Rule 11 violation in this case was not the result of negligence; rather, it was deliberate and intentional. Second, this court has previously determined, and the Fourth Circuit has affirmed, that sanctioned counsel

violated all three prongs of Rule 11. Such an extensive violation is egregious and warrants a strong sanction.

III. Joint and Several Liability

The Fourth Circuit affirmed the imposition of joint and several liability in this case. In re Kunstler, 914 F.2d at 525("joint and several liability . . . was not inappropriate"). Where several attorneys sign a complaint in violation of Rule 11, each attorney violates the rule and must be sanctioned. Mr. Kunstler, Mr. Nakell, and Mr. Pitts each violated Rule 11 by failing to make a reasonable inquiry to determine that the complaint stood well grounded in fact and warranted by existing law, and by filing the complaint for an improper purpose. Because their violations are the same, this court makes no distinction among them but treats them equally.

CONCLUSION

Having determined that a monetary sanction is appropriate in this case for violating Rule 11 of the Federal Rules of Civil Procedure and having analyzed the four factors set forth by the Fourth Circuit, the court hereby imposes liability on William M. Kunstler, Barry Nakell, and Lewis Pitts, jointly and severally, in the amount of fifty thousand dollars ($50,000). The court orders that this amount be remitted to the Clerk of the United States District Court for the Eastern District of North Carolina with interest at the Government rate from the date of entry of this order.

When these sums are received by the Clerk of this court, he shall in turn remit to the State of North Carolina the amount of forty-five thousand dollars ($45,000) plus accrued interest and shall remit to Steven C. Lawrence for

Robeson County the amount of five thousand dollars ($5,000) plus accrued interest.

This court further orders that until the aforementioned sums are paid, William M. Kunstler, Barry Nakell, and Lewis Pitts are hereby prohibited from appearing in or practicing before the United States District Court for the Eastern District of North Carolina.

The Clerk of this court is hereby directed to enter judgment accordingly.

This 30th day of August, 1991.

/s/
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#19

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 91-2265, 91-2266, 91-2267

In Re: P. Lewis Pitts, Jr., et al.

Appeals from the United States District Court
for the Eastern District of North Carolina, at Fayetteville.
Malcolm J. Howard, District Judge.
(CA-89-6-3-CIV-H)

Argued: May 5, 1992
Decided: July 2, 1992

Before WILKINSON and WILKINS, Circuit Judges, and
CHAPMAN, Senior Circuit Judge

Affirmed as modified by unpublished per curiam opinion.

COUNSEL

ARGUED: Jonathan D. Sasser, MOORE & VAN ALLEN, Raleigh, North Carolina; Morton Stavis, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; P. Lewis Pitts, CHRISTIC INSTITUTE SOUTH, Durham, North Carolina, for Appellants. David Roy Blackwell, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. ON BRIEF: Martha A. Geer, PATTERSON, HARKAVY, LAWRENCE, VAN

NOPPEN & OKUN, Raleigh, North Carolina, for Appellant Nakell; Alan McSurely, Chapel Hill, North Carolina, for Appellant Kunstler, Lacy H. Thornburg, Attorney General for North Carolina, James J. Coman, Senior Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina; Steven C. Lawrence, ANDERSON, BROADFOOT, JOHNSON & PITTMAN, Fayetteville, North Carolina, for Appellees. Daniel J. Popeio, Richard A. Samp, WASHINGTON LEGAL FOUNDATION, Washington, D.C., for Amici Curiae.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

We are once again presented with an appeal by attorneys William Kunstler, Barry Nakell, and Lewis Pitts ("appellants") following the order of the district court imposing Rule 11 sanctions against them. The sole issue we must decide is whether the district court abused its

discretion by imposing sanctions in the amount of $50,000 against the appellants.

The substantive facts of this case are set out fully in In re Kunstler, 914 F.2d 505 (4th cir. 1990), cert. denied, 111 S. Ct. 1607 (1991), and will not be repeated in detail. On January 31, 1989, appellants brought on behalf of eight plaintiffs against various North Carolina state and local officials ("defendants") a § 1983 action which was dismissed pursuant to Rule 41(a)(2) on May 2, 1989. On June 13, 1989, the state defendants filed a motion for sanctions under Rule 11, and the county defendants filed a similar motion on July 5, 1989. The district court, following arguments of counsel, found that the appellants had brought the civil suit for an improper purpose and had failed to make a reasonable inquiry to determine if the complaint was well grounded in fact and warranted by

existing law. The court imposed sanctions of $122,834.28 and the attorneys appealed.

We affirmed the district court's holding that the appellants had violated all three prongs of Rule 11, but we vacated the sanctions imposed and remanded to the district court with instructions for reconsideration of the appropriate sanctions.

On remand, the district court heard argument from counsel regarding the appropriate sanctions and imposed sanctions of $50,000. The attorneys once again appeal. We review the imposition of sanctions for abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, ___, 110 S. Ct. 2447, 2460 (1990); Kunstler, 914 F.2d at 513.

Appellants first challenge the award of monetary sanctions, arguing that non-monetary sanctions would have been sufficient to meet the purposes of Rule 11. We

disagree. The district court considered various non-monetary sanctions, including a reprimand, mandatory continuing legal education, and mandatory pro bono work, but concluded that the circumstances surrounding this case required the imposition of monetary sanctions in order to deter future litigation abuse. Such a determination is within the court's discretion, and we find no abuse in this ruling.

Appellants next contend that the amount of the monetary sanction is excessive. In the prior appeal, we set forth four factors a district court should consider in determining the appropriate amount of sanctions: (1) the reasonableness of the injured party's requested fees and expenses; (2) the minimum necessary to deter; (3) the sanctioned party's ability to pay; and (4) other factors relating to the severity of the Rule 11 violation. Kunstler, 914 F.2d at 523.

Reasonable fees include only those fees charged for time spent responding to the sanctioned claims and do not include time spent pursuing Rule 11 sanctions. Id. The district court reviewed the fees and expenses claimed by defendants, a total of $92, 834.28, and reduced this amount by the amount of fees and expenses incurred in pursing Rule 11 sanctions. The court concluded that the remaining fees and expenses totalling $59,000 were reasonable, and after considering the appellants' ability to pay, the minimum necessary to deter, and the severity of the violation, imposed sanctions in the amount of $50,000.

Appellants contest the costs claimed by the defendants for time spent by paralegals and SBI agents, arguing that the lack of itemization makes it impossible to tell whether any of this time was spent pursuing Rule 11 sanctions. Defendants claimed a total of $6,675.00 for time spent by SBI agents and paralegals, but admitted in

oral argument that approximately 40% of this time was spent pursuing Rule 11 sanctions, and thus is unrecoverable. We are concerned by the very general statements made and lack of specificity in the affidavits supporting the costs claimed for paralegal and SBI work, and we find that these costs should not be allowed. The district court may have had in mind this lack of specificity when it concluded that reasonable fees and expenses were $59,000, but reduced this amount to $50,000. However, it failed to make this clear in its order.

After carefully reviewing the briefs and the record and considering the oral arguments, we conclude that appellants' remaining challenges are without merit. The district court acted within its discretion in imposing sanctions, and we affirm but we reduce the judgment to $43,325.00 ($50.000 minus $6675.00).

AFFIRMED AS MODIFIED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 20, 1992

No. 91-2265
CA-89-6-3-CIV-H

In Re: P. LEWIS PITTS, JR.

Appellant

ROBESON DEFENSE COMMITTEE; CARNELL LOCKLEAR; MARY SANDERSON; THELMA CLARK; ELEANOR JACOBS; BETTY MCKELLAR; EDDIE HATCHER; TIMOTHY BRYAN JACOBS

Plaintiffs

v.

JOE FREEMAN BRITT; RICHARD TOWNSEND; LEE SAMPSON; HUBERT STONE; LACY THORNBURG; ROBERT MORGAN; JAMES BOWMAN; JAMES G. MARTIN

Defendants - Appellees

and

SBI DOE, I; SBI DOE, II; SBI DOE, III; DEPUTY SHERIFF DOE, I; DEPUTY SHERIFF DOE, II; DEPUTY SHERIFF DOE, III; DEPUTY SHERIFF DOE, IV; DEPUTY SHERIFF DOE, V; DA DOE, I; DA DOE, II; DA DOE, III; ROBESON COUNTY

Defendants

WASHINGTON LEGAL FOUNDATION; JESSE HELMS, U.S. SENATOR; THE ALLIED EDUCATION FOUNDATION

Amici Curiae

No. 91-2266
CA-89-6-3-CIV-H

In Re: BARRY NAKELL

Appellant

ROBESON DEFENSE COMMITTEE; CARNELL LOCKLEAR; MARY SANDERSON; THELMA CLARK; ELEANOR JACOBS; BETTY MCKELLAR; EDDIE HATCHER; TIMOTHY BRYAN JACOBS

Plaintiffs

v.

JOE FREEMAN BRITT; RICHARD TOWNSEND; LEE SAMPSON; HUBERT STONE; LACY THORNBURG; ROBERT MORGAN; JAMES BOWMAN; JAMES G. MARTIN

Defendants - Appellees

and

SBI DOE, I; SBI DOE, II; SBI DOE, III; DEPUTY SHERIFF DOE, I; DEPUTY SHERIFF DOE, II; DEPUTY SHERIFF DOE, III; DEPUTY SHERIFF DOE, IV; DEPUTY SHERIFF DOE, V; DA DOE, I; DA DOE, II; DA DOE, III; ROBESON COUNTY

Defendants

WASHINGTON LEGAL FOUNDATION; JESSE HELMS, U.S. SENATOR; THE ALLIED EDUCATION FOUNDATION

Amici Curiae

No. 91-2267
CA-89-6-3-CIV-H

In Re: WILLIAM M. KUNSTLER

Appellant

ROBESON DEFENSE COMMITTEE; CARNELL LOCKLEAR; MARY SANDERSON; THELMA CLARK; ELEANOR JACOBS; BETTY MCKELLAR; EDDIE HATCHER; TIMOTHY BRYAN JACOBS

Plaintiffs

v.

JOE FREEMAN BRITT; RICHARD TOWNSEND; LEE SAMPSON; HUBERT STONE; LACY THORNBURG; ROBERT MORGAN; JAMES BOWMAN; JAMES G. MARTIN

Defendants - Appellees

and

SBI DOE, I; SBI DOE II; SBI DOE, III; DEPUTY SHERIFF DOE, I; DEPUTY SHERIFF DOE, II; DEPUTY SHERIFF DOE, III; DEPUTY SHERIFF DOE, IV; DEPUTY SHERIFF DOE, V; DA DOE, I; DA DOE, II; DA DOE, III; ROBESON COUNTY

Defendants

WASHINGTON LEGAL FOUNDATION; JESSE HELMS, U.S. SENATOR; THE ALLIED EDUCATION FOUNDATION

Amici Curiae

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Appellants filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Chapman, with the concurrence of Judge Wilkinson and Judge Wilkins.